No. 83-1961

IN THE

Supreme Court of the United States

October Term, 1983

LANDRETH TIMBER COMPANY,
Petitioner,

v.

IVAN K. LANDRETH, LUCILLE LANDRETH, THOMAS E. LANDRETH, IVAN K. LANDRETH, JR., AND KATHLEEN LANDRETH
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the sale of an entire business consummated by means of transfer of 100% of the stock of a closely held corporation and accompanied by the purchaser's complete assumption of control over the business, is a transaction withing the scope of the Securities Act of 1933 and the Securities Exchange Act of 1934?

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Respondents Ivan K. Landreth, Lucille Landreth, Thomas E. Landreth, Ivan K. Landreth, Jr., and Kathleen Landreth ("Landreths") respectfully request that the Petition for a writ of Certiorari be denied.

STATEMENT OF THE CASE

A. Description of Proceedings Below

In 1977, the Landreths sold an inoperable sawmill which was under reconstruction in Tonasket, Washington, to the corporate predecessor in interest of petitioner, Landreth Timber Company, Inc. On November 1, 1978, Landreth Timber Company, Inc. ("Landreth II") commenced an action in the Western District of Washington alleging violations of federal and state securities laws and asserting claims under state common laws in connection with the sale of the sawmill. The

district court, on Landreths' summary judgment motion, dismissed Landreth II's case for lack of federal jurisdiction. After review of the record, including admissions of fact, the district court held that Landreths' sale of the the sawmill, by transfer of 100% of the stock of a closely held, family corporation to purchasers who assumed complete control after closing, did not constitute a federal securities transaction.[1] The Ninth Circuit affirmed the district court.[2]

B. Summary of Transactional Background

Landreths were the sole shareholders of a closely held corporation, Landreth Timber Company ("Landreth II"), which owned the sawmill.[3] Prior to the transaction at issue, a portion of the mill was destroyed by fire. The Landreths began to rebuild, adding modern equipment and innovations to increase production. Before construction was completed, Samuel S. Dennis III and John Bolten, Sr. expressed an interest in purchasing the mill.

Dennis and Bolten, the principal financial backers behind the purchase, were sophisticated businessmen. Dennis, as a senior partner and tax attorney at the Boston law firm of Hale and Dorr, had extensive practical experience with business acquisitions. As a co-founder, officer and director of Standex Corporation, a Fortune 500 conglomerate whose shares are traded on the New York Stock Exchange, Dennis had been involved in numerous transactions, not only as counsel for buyers and sellers of businesses, but also as a purchaser. Bolten had been the honorary chairman of the board and was a major shareholder in Standex.

Prior to closing, Dennis and Bolten conducted an extensive and meticulous pre-purchase investigation. In addition to visiting

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1. The Order Granting Summary Judgment, dated April 29, 1981, is attached hereto as Appendix B.

2. The Ninth Circuit's opinion, as modified, is attached hereto as Appendix A.

3. All factual assertions are supported by the Admissions of Fact which are attached hereto as Appendix C.

the sawmill site, Dennis retained numerous local experts to assist in the investigation and negotiations. Those experts included, among others, a sawmill engineering firm which analyzed the strengths, weaknesses, capabilities and value of the mill, a certified public accountant who investigated the assets, liabilities, and performance history of the sawmill business, and a bank officer who was an expert on sawmill properties and who inspected the mill prior to providing the purchasers with financing for the transaction.

Although the transaction could as easily have been structured as an asset sale, the Landreths preferred a stock sale for tax purposes. Negotiations between the Landreths and Dennis culminated in a detailed stock purchase agreement, drafted primarily by the purchasers with the assistance of Dennis' law firm. Dennis and Bolten subsequently organized a small group of investors to form B & D Company, a Delaware corporation, to make the purchase. B & D completed the purchase according to the terms of the stock purchase agreement, and then merged with Landreth I to form Landreth II.

Upon closing, Dennis and Bolten were the only directors of Landreth II. Dennis became president, and other officers of Landreth II were designated by Dennis and Bolten.

Undisputed admissions of fact before the trial court established that Landreths retained absolutely no post-closing control over management of the business, and had no ability to determine the outcome of the purchasers' investment. (*See* Admissions No. 32, 38, 42-49, 56, 59, 61, 62, 64-67, 72-81, 83, 85, 87 in Appendix C.)

There was nothing "passive" about the purchasers' investment in Landreth I. Motivated by the potential for high profits in the lumber business, the purchasers embarked on an entrepreneurial program through which they intended to and did actively manage the business acquired from the Landreths. Purchasers bought all of the stock in Landreth I, and sellers retained no share interest or right to receive any post-closing profits. Purchasers' hired their own mill manager prior to closing, and proceeded to compiete construction and operate

the mill according to their own business decisions. Ivan Landreth, who at the request of purchasers had signed a one-year consulting agreement, was terminated within two months of closing and had no substantive role in post-closing management. It is the position of the Landreths that the losses incurred by purchasers were due solely to their own business decisions in improperly rebuilding the mill, purchasing equipment, operating the mill, and making poor marketing decisions after closing.

In short, the sophisticated purchasers of the Landreth mill were not the sort of "passive" investors whom the securities laws were designed to protect. To the contrary, these purchasers aggressively asserted complete control over a closely held business through their acquisition of 100% of the corporate stock and subsequent management decisions. When those business decisions went awry, they sought to avail themselves of the federal securities laws, a result never intended by Congress or this Court.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should not be granted for the following reasons:

1. The *Landreth* case is distinguishable from *Vista Resources, Inc. v. Seagrave Corp.*, No. 83-1084. Although certiorari was granted in *Vista Resources*, it should not be granted on the facts of the *Landreth* case.

2. The Ninth Circuit's decision was accurate and the correct result was reached for the following reasons:

(a) The Securities Act of 1933, § 2, 15 U.S.C. § 77b, and the Securities Exchange Act of 1934, § 3, 15 U.S.C. § 78c(a), both require analysis of the context of the underlying transaction in order to determine whether an instrument constitutes a "security;"

(b) The test applied by this Court in *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946), requires an analysis of the underlying transaction, including whether the purchaser assumes control over the outcome of the investment.

(c) The Ninth Circuit properly applied the *Howey* test; and

(d) This Court should continue to apply a transactional analysis and reject the literal approach when determining whether an instrument is a security.

3. The result reached below was fair in view of the fact that petitioner may pursue its claims in a state court forum.

REASONS FOR DENYING THE WRIT

I. The Grant of Certiorari in *Vista Resources v. Seagrave Corp.* Does Not Require a Grant of Certiorari In This Case.

Petitioner cites a number of reasons in support of granting certiorari in this case, none of which are well founded.

Petitioner first argues that the grant of certiorari in *Seagrave Corp. v. Vista Resources, Inc.*, 696 F.2d 227 (2d Cir. 1982), *modified*, 710 F.2d 95 (1983) (per curiam), *cert. granted*, 52 U.S.L.W. 3185 (1984), requires a grant of certiorari in this case. It does not. In *Vista Resources*, this court necessarily will decide on a rule of law which will determine the validity of the "sale of business doctrine." Conflicting decisions of the various circuits deciding this same issue inevitably will be resolved by *Vista Resources*, rendering moot the need to grant certiorari in the instant case.

Regardless of any decision based upon the facts in the *Vista Resources* case, the *Landreth* case presents an even stronger factual pattern for holding that the federal securities acts do not apply. The facts of the *Landreth* case clearly place it outside of the federal securities laws.

As the Ninth Circuit noted, the economic realities of the Landreth transaction leave no doubt that the sale of 100% of the stock of the closely held corporation was a sale of a business outside the scope of federal securities laws. The following comparison of facts in *Landreth* and in *Vista Resources* demonstrates that the two cases involve dissimilar transactions and that the *Landreth* case does not involve a security transaction.

(1) The Landreths basically sold assets rather than a going concern. At the time of sale, such assets principally consisted of an inoperable sawmill under reconstruction.

(2) The sawmill and the business it generated when in operation were privately held by the Landreth family. The seller in *Vista Resources* was a publicly traded company with securities listed on the New York Stock Exchange.

(3) The principal purchasers in the *Landreth* case were Dennis and Bolten, both sophisticated businessmen. They conducted a complete and thorough investigation of the sawmill business before closing, and obtained the assistance of numerous experts, including, among others, a sawmill expert who inspected and appraised the sawmill and an accountant who reviewed mill records. The purchasers in *Vista Resources* evidently relied upon public information, 10-K and 10-Q Reports, filed with the Securities Exchange Commission, rather than their own independent investigation.

(4) The transaction could have been an asset sale or a stock sale. The final transaction, reflected in purchase documents drafted primarily by Dennis' law firm, provided for a 100% stock sale and for the resignation of all former officers and directors of Landreth Timber Company. The purchaser in *Vista Resources*, in connection with acquisition of the seller's stock, wanted no representation on the seller's board of directors because the purchase of stock was for investment purposes.

(5) The purchasers in *Landreth* were entrepreneurs who intended to, and did, actively manage and operate the sawmill business, rather than rely on the efforts of others for the production of profits. Such purchasers determined the outcome of their own investment. For instance, even before closing, Dennis, without consulting Landreth, arranged for a new sawmill general manager to be hired. Landreth was resigned to a post-closing position as a consultant, terminable at will by the company on thirty days notice. The new general manager took over mill operations immediately upon closing, and within two months gave Ivan Landreth notice that he was fired. In *Vista Resources*, there were employment contracts with existing

management, providing assurances that present personnel would continue to manage the corporation.

(6) Admitted facts before the district court undeniably established that the Landreths had *no* control over the activities or management of the sawmill after closing. Over Landreths' objections, the mill was not completed as designed before closing and substantial expenditures were made by the new manager, expenditures not contemplated before closing. The actions of the new manager substantially changed the cost of completion for mill reconstruction as well as the productive capacity of the sawmill. The Landreths' position is that the failure of the general manager to complete and operate the sawmill competently was the cause of the purchaser's unprofitability. Landreths deny, and the record before this Court does not support petitioners' assertions of misrepresentation.

Thus, the *Landreth* case is factually distinguishable and does not require a grant of certiorari to resolve the same issue raised in *Vista Resources*.

II. The Ninth Circuit's Decision is Correct and Review by this Court is Unnecessary.

A. The Securities Act of 1933 and the Securities Exchange Act of 1934 Require Analysis of the Underlying Transaction to Determine Whether an Instrument is a Security.

1. Statutory Language Requires Consideration of the Underlying Transaction Where There is a Sale of "Stock".

The relevant language of the 1933 and 1934 Acts belies the principal argument against the sale of business doctrine -- the belief that each transaction involving anything called "stock" should necessarily be given protection under those Acts. Stock is only one of a number of types of instruments enumerated in the Acts which may be a security for statutory purposes under certain circumstances.

Even though an instrument bears a label expressly contained in the statutory definition, that definition is qualified by the condition "unless the context otherwise requires . . . .".

15 U.S.C. § 77b and 15 U.S.C. § 78c(a). Accordingly, as discussed in *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946), and *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), both Acts require analysis of the context of the transaction, not just the label of the instrument.

As in cases involving "notes" and certificates of deposit, the statutory language allows the Court, when dealing with "stock," to focus on factors other than simply the name and character of the instrument. *See e.g., Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982); *Great Western Bank v. Kotz*, 532 F.2nd 1252 (9th Cir. 1976). As the Court observed in *Marine Bank:*

> Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the *purposes intended* to be served, and the *factual setting as a whole.*

455 U.S. at 560 n. 11 (emphasis added).

As discussed below, a transaction involving the sale of a business, such as the Landreths' sawmill, by the sale of 100% of a closely held corporation's stock, falls outside the definition of a security.

2. Congress Did Not Intend to Include the Sale of an Entire Business Within the Scope of Federal Securities Acts.

While Congress intended the term "security" to include "the many types of instruments that in our commercial world fall within the ordinary concept of a security," H.R. REP. NO. 85, 73d Cong., 1st Sess. 11 (1933), the Securities Acts were designed to protect those who turn over their capital to third parties who control the outcome of such investments, not those who are managers themselves, exercising enterpreneurial control. *See* Thompson, *The Shrinking Definition of a Security: Why Purchasing All of a Company's Stock is Not a Federal Security Transaction*, 57 N.Y.U.L. REV. 225, 241 (1982); H.R. REP. NO. 85, 73d Cong., 1st Sess. 2 (1933); S. REP. NO. 47, 73d Cong., 1st Sess. 7 (1933).

One of the principal aims of the bill which became the 1933 Act was:

> A demand that the persons, whether they be directors, experts, or underwriters, who sponsor the investment of other people's money should be held up to the high standards of trusteeship.

H.R. REP. NO. 85, 73d Cong., 1st Sess. 3 (1933).

The investors whom Congress sought to protect are those who place their funds into the trust of others and not those who buy and control an enterprise. The purchase of an entire business, such as the *Landreth* sawmill, where the buyer acquires and exercises 100% control, is not one of the "schemes" Congress sought to regulate via the 1933 and 1934 Acts.

3. The Test Applied by this Court in *SEC v. W. J. Howey Co.* Requires an Analysis of the Underlying Transaction, Including Whether the Purchaser Assumes Control over the Outcome of the Investment.

To establish whether an instrument falls within the concept of a security under the 1933 Act and the 1934 Act, this Court has examined whether the transaction represents any of the "countless and variable schemes devised by those who seek *the use of the money of others* on the promise of profits," *SEC v. W.J. Howey Co.*, 328 U.S. at 299 (emphasis added). The Court has viewed the definition of a security to be a "flexible rather than static principle" and, in *Howey*, enunciated a test which embodies the "essential attributes that run through all of the Court's decisions defining a security." *Forman*, 421 U.S. at 852. That test is comprised of three factors:

1. An investment in a common enterprise;

2. An expectation of profits; and

3. Profits which are to come solely from the efforts of others.

The "profits" to be derived solely from the efforts of others mean either "capital appreciation resulting from the development of the initial investment" or "a participation in earnings resulting from the use of investors' funds." *Forman*, 421 U.S. at 852. Where a purchaser acquires complete control of a business, such expected profits are not derived from the efforts of the seller. It is the purchaser who is in control of

the development of the initial investment or of the earnings which may result from the use of the purchaser's own funds.[4]

This is illustrated in the *Landreth* case where the purchasers of the sawmill thereafter controlled the hiring and firing of personnel, mill reconstruction, marketing strategy and every significant business decision – all of the factors which determined whether capital appreciation would ensue. After the sale, the Landreths were not using the funds of the purchasers with the promise of profits. Rather, they had totally divested themselves of a sawmill by means of a stock transfer, a form of sale often used as a matter of tradition or convenience, or for unrelated tax reasons.

4. In *Landreth*, the Ninth Circuit Correctly Applied the Howey Test.

The question involving the definition of a security in the context of a sale of a business was one of first impression in the Ninth Circuit. In holding that the sale of a family business by means of a 100% stock transfer does not involve the sale of "securities" under the federal securities acts, the Ninth Circuit followed *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975).[5] In *Forman*, this Court defined the

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4. Whether *control* over the investment passes from seller to buyer was identified by the *Forman* Court as a crucial factor distinguishing passive investments subject to the securities laws from the *Landreth*-type acquisition:

> In such cases [citing *SEC v. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943), and *Tcherepnin, supra,*] the investor is "attracted solely by the prospects of return" on his investment. By contrast, when a purchaser is motivated by a desire to use or consume the item purchased – "to occupy the land or to develop it themselves," as the *Howey* Court put it – the securities laws do not apply.

421 U.S. at 852-53 (citations omitted).

5. In addition to the Ninth Circuit, the Seventh, Tenth and Eleventh Circuits have employed an "economic realities" analysis to conclude that the sale of a business is not a "security." *See Sutter v. Groen*, 687 F.2d 197 (7th Cir. 1982); *Canfield v. Rapp & Son, Inc.*, 654 F.2d 459 (7th Cir. 1981); *Fredericksen v. Poloway*, 637 F.2d 1147 (7th Cir.), *cert. denied*, 451 U.S. 1017 (1981); *Christy v. Cumbron*, 710 F.2d 669 (10th Cir. 1983); *Chandler v. Kew, Inc.*, 691 F.2d 443 (10th Cir. 1977); *King v. Winkler*, 673 F.2d 342 (11th Cir. 1982).

parameters of federal securities laws by looking to "the economic realities underlying a transaction, and not the name appended thereto." 421 U.S. at 849.

The *Howey* test was used by the Ninth Circuit to determine whether, in economic reality, a transaction involves an instrument within the scope of the federal securities laws. That test is whether "the scheme involves an investment of money in *a common enterprise* with profits to come *solely from the efforts of others.*" 328 U.S. at 301 (emphasis added). In *Landreth*, the admitted facts demonstrated that the purchasers did *not* invest in a "common enterprise" with the Landreths; more importantly, instead of relying upon the sellers for their profit expectations, the purchasers exerted *total control* over the outcome of their investment.

The Ninth Circuit noted that the application of the *Howey* test to the acquisition of a business through purchase of stock is straightforward:

> [W]hen a person purchases control of a business, he does not make an investment from which he expects profits solely from the efforts of others. Although the transaction involves stock, the economic realities reflect acquisition of a business, not passive investment, and the Acts therefore do not apply.

731 F.2d at 1352.

The Ninth Circuit correctly observed that, while the sale of business doctrine is still evolving, under any formulation of the doctrine, the economic realities of the underlying transaction involving Landreth's sawmill leave no doubt that the sale of an entire business occurred, not an investment in a security.

5. This Court Should Continue to Apply a Transactional Analysis and to Reject a Literal Approach.

Analysis of the "economic realities" of the "underlying transaction" is a natural evolution of the *Howey* test, consistent with Congressional purpose and this Court's precedents. Even when holding that an instrument in a particular transaction should be deemed a security, this Court has directed that "form

should be disregarded for substance." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Recognizing that a "name or description" of an instrument may be used for reasons of "tradition or convenience," the *Forman* Court expressly rejected the "literal approach." *Forman*, 421 U.S. at 848-50 (holding that purchases of "stock" in a housing corporation were not security transactions under the federal securities laws).

"Stock" with more conventional characteristics than the "stock" in *Forman* often is used as a matter of "tradition or convenience" where parties are buying or selling a business. Circuit courts which have incorrectly rejected the sale of a business doctrine have stopped their evaluation of a transaction upon determining that the instrument called "stock" has characteristics traditionally associated with stock. They have refused to look at other criteria relevant to determining the nature of the transaction[6], essentially resurrecting the disfavored "literal approach."

Congress' inclusion of qualifying language ("unless the context otherwise requires") in its description of instruments which could be "securities" under the 1933 and 1934 Acts reflects the fact that, of the several dozen instruments identified, many have not traditionally been considered "securities" (e.g., "notes," "certificate of interest in a profit-sharing agreement"). *See* 15 U.S.C. § 77b. "Stock" is no more sacred than any other instrument identified in the Acts. The fact that an instrument bears the label, or has certain attributes, of "stock" (or a "note," or a "certificate of interest in a profit-sharing agreement") cannot determine whether the transaction is governed by the federal securities acts. It would be absurd to suggest that every instrument with the attributes of a "note" or a "certificate of interest in a profit-sharing agreement" is a security. Whether such instruments are "securities" under the Acts must depend upon transactional context. One

6. *See Golden v. Garafalo*, 678 F.2d 1139 (2d Cir. 1982); *Occidental Life Insurance Company v. Pat Ryan & Assoc., Inc.*, 496 F.2d 1255 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974); *Coffin v. Polishing Machines, Inc.*, 596 F.2d 1202 (4th Cir.), *cert. denied*, 444 U.S. 868 (1979); *Daily v. Morgan*, 701 F.2d 496 (5th Cir. 1983).

fallacy of the "literal" or "normal attributes" approach is that it fails when applied to those instruments identified in the Acts whose "normal attributes" would *not* ordinarily lead to classification as a security.

Finally, as a matter of federal policy, application of federal securities laws to the sale of a business would open the doors of the federal courts to "an escalating stream of cases where purchasers of businesses have become disillusioned with the bargains they have made." *Seagrave Corporation v. Vista Resources, Inc.*, 696 F.2d 227, 230 (2d Cir. 1982) (Lumbard, J., dissenting). Such cases, if justiciable at all, belong in the state courts.

III. Landreth II has asserted Similar Claims in Another Forum.

Landreth II is proceeding with an action in the Superior Court for the State of Washington, King County, *Landreth Timber Company v. Ivan K. Landreth*, Civil No. 80-2-11740-8. It has asserted claims in that action for state securities law violations, breach of warranty and common law fraud. A denial of certiorari will not deprive Landreth II of its day in court.

CONCLUSION

The petition for certorari should be denied.

Dated this 2nd day of July, 1984.

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APPENDIX A

LANDRETH TIMBER COMPANY,
Plaintiff-Appellant,
v.
Ivan K. LANDRETH and Lucille Landreth, husband and wife; Thomas E. Landreth, Ivan K. Landreth, Jr., and Kathleen Landreth, husband and wife, Defendants-Appellees.

No. 81-3446.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 8, 1982.

Decided March 7, 1984.

As Modified April 24, 1984.

Appeal from the United States District Court for the Western District of Washington.

Before BROWNING, Chief Judge, TUTTLE* and FARRIS, Circuit Judges.

BROWNING, Chief Judge:

The issue raised in this appeal is whether sale of 100 percent of the stock of a closely-held corporation is a transaction involving a "security" within the meaning of the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa, and the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk. The district court held that it was not, relying upon the "sale-of-business" exemption from the Security Acts. We affirm.

I.

Defendant Ivan Landreth and his two sons were the sole shareholders of Landreth Timber Co. (Landreth I) which owned a sawmill in Tonasket, Washington. Landreth decided to sell the mill. Before a buyer could be found, a portion of the mill was destroyed by fire. Landreth began to rebuild, adding modern equipment and design innovations to increase production. Before construction was completed, Samuel Dennis, a Boston attorney representing a small group of investors, expressed an interest in purchasing the mill.

Landreth insisted on a sale of the stock of Landreth I rather than a sale of its assets. Negotiations culminated in a detailed stock purchase agreement. The purchasers formed a Delaware corporation, the B & D Company, to make the purchase. B & D completed the purchase according to the terms of the agreement. B & D then merged with Landreth I to form Landreth Timber Co. II.

Landreth declined the purchaser's offer to manage the mill but signed a one-year consulting agreement with Landreth II, terminable at will on 30-days notice. The purchasers hired a full-time manager; Landreth's post-closing role was purely advisory.

Neither Dennis nor Bolten (Dennis's principal partner) or the other investors in the group had any knowledge of the lumber industry. Their decision to purchase the mill was allegedly based on representations by Landreth as to the cost of rebuilding the mill, and its productive capacity when rebuilt.

Landreth II was unprofitable. It sold the mill, and went into receivership. Landreth II brought suit in the Western District of Washington claiming damages of $2,500,000 for violations of the federal securities laws. The district court granted summary judgment for the Landreths on the ground that the Landreth stock was not a "security" within the meaning of the Acts.

"Stock" is among the instruments listed in the definition of "security" under the Acts,[1] and the district court acknowledged

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1. Section 2 of the Securities Act of 1933 states: When used in this subchapter, unless the context otherwise requires—

(1) The term "security " means any note, *stock*, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. § 77b(1) (emphasis added).

the Landreth stock had all the usual characteristics of stock. Nonethless, the court held that under the test announced *SEC v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L.Ed. 1244 (1946), Landreth stock was not a "security."

Howey held an instrument to be an "investment contract," and thus a "security," if "the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey*, 328 U.S. at 301, 66 S.Ct. at 1104. Although *Howey* did not address a transaction involving stock, the district court held it was required by *United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d. 621 (1975)*, to apply the *Howey* test "to all cases

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Footnote 1 (Con't)

Section 3(a)(3) of the 1933 Act exempts

Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

15 U.S.C. § 77c(a)(3).

Section 3(a)(10) of the 1934 Act States:

(a) When used in this chapter, unless the context otherwise requires—

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, tranferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance, which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

15 U.S.C. § 78c(a)(10) (emphasis added).

The definition under the two Acts has been held to be "virtually identical". *Tcherepnin v. Knight*, 389 U.S. 332, 335-36, 88 S.Ct 548, 552-53, 19 L.Ed.2d 564 (1967).

where the meaning of a 'security' is at issue." The district court held the Landreth stock was not a "security" under *Howey* because by buying 100 per cent of the stock of Landreth I, B & D Company necessarily expected to operate the business and did not expect to obtain "profits from the management or entrepreneurial efforts of others."

II.

Whether sale of 100 percent of the stock of a closely-held corporation is a transaction involving a "security" has divided the circuits and commentators.[2] The Seventh,[3] Tenth,[4] and

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2. *Compare* Seldin, *When Stock is Not a Security: The "Sale of Business" Doctrine Under the Federal Securities Laws*, 37 Bus.Law. 637 (1982); Thompson, *The Shrinking Definition of a Security: Why Purchasing All of a Company's Stock is Not a Federal Securities Transaction*, 57 N.Y.U.L. Rev. 225 (1982); Note, *The Security Status of Stock Transfers Incident to the Purchase of a Business: The "Sale of Business" Controversy in the Aftermath of* Golden v. Garafalo, 47 Alb.L. Rev. (1983); Note, *Function Over Form: The "Security,"* 63 B.U.L.Rev. 1129 (1983); Note, *The Sale of Business Doctrine: A Decade After* Forman 49 Brooklyn L.Rev. 1325 (1983); Comment, *Acquisition of Businesses Through Purchase of Corporate Stock: An Argument for Exclusion from Federal Securities Regulation*, 8 Fla.St.U.L.Rev. 295 (1980); Note, *The Sale-of-Business Doctrine*—Golden v. Garafalo, 1983 B.Y.U.L.Rev. 201 (1983); Note, *The Second Circuit Rejects the Sale of Business Doctrine*, 57 Tul.L.Rev. 715 (1983) (all endorsing the sale of business doctrine) *with* Black, *Is Stock a Security? A Criticism of the Sale of Business Doctrine in Securities Fraud Litigation*, 15 U.C.D.L.Rev. 325 (1983); Hazen, *Taking Stock of Stock and the Sale of Closely Held Corporations: When is Stock Not a Security?*, 61 N.C.L.Rev. 393 (1983); Karjala, *Realigning Federal and State Roles in Securities Regulation through the Definition of a Security*, 1982 U.Ill.L.Rev. 413; Prentice & Roszkowski, *The Sale of Business Doctrine: Relief from Securities Regulation or a New Haven for Welshers?*, 44 Ohio St.L.J. 473 (1983); Rapp, *Federal Securities Laws Should Protect Some Purchases of All or Substantially All of a Corporation's Stock*, 32 Case W.Res. 595 (1982); Comment, *A Criticism of the Sale of Business Doctrine*, 71 Calif.L.Rev. 974 (1983); Note, *Repudiating the Sale-of-Business Doctrine*, 83 Colum.L.Rev. 1718 (1983); Note, 51 Wash.U.L.Q. 659 (1983) (repudiating the sale of business doctrine). *See also* Fitzgibbon, *What is a Security?—A Redefinition Based on Eligibility to Participate in the Financial Markets*, 64 Minn.L.Rev. 893 (1980); Note, *Recent Ninth Circuit Developments in Securities Law*, 13 Loy.L.A.L.Rev. 985 (1980); Comment,

Eleventh[5] circuits recognize the sale-of-business doctrine, under which a purchaser of stock who assumes control of a company is not an "investor" expecting profits from the efforts of others under the *Howey* test, and the stock purchased therefore is not a "security" within the meaning of the Acts. The Second[6], Third[7], Fourth[8], Fifth[9], and Eighth[10] Circuits reject the doctrine, and hold that the federal securities laws apply if the transferred instruments possess the characteristics commonly associated with stock.

A.

Although the precise question is one of first impression in this circuit, appellees argue that we have decided it in substance in cases dealing with "notes," which, like stock, are instruments

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Footnote 2 (Con't)

Securities Regulation: Application of the Federal Securities Laws to the Sale of a Closely Held Corporation, 22 Washburn L.J. 406 (1983); Note, *Continuing Confusion in the Definition of a Security: The Sale of a Business Doctrine, Discretionary Trading Accounts, and Oil, Gas, and Mineral Interests*, 40 Wash. & Lee L.Rev. 1225, 1280 (1983).

3. *Sutter v. Groen*, 687 F.2d 197, 202 (7th Cir. 1982); *Canfield v. Rapp & Son, Inc.*, 654 F.2d 459, 465 (7th Cir.1981); *Frederiksen v. Poloway*, 637 F.2d 1147, 1151-52 (7th Cir.1981).

4. *Christy v. Cambron*, 710 F.2d 669, 672 (10th Cir.1983); *Chandler v. Kew, Inc.*, 691 F.2d 443, 444 (10th Cir.1977).

5. *King v. Winkler*, 673 F.2d 342, 345 (11th Cir.1982). *See also Kaye v. Pawnee Const. Co.*, 680 F.2d 1360, 1366 n. 2 (11th Cir.1982).

6. *Golden v. Garafalo*, 678 F.2d 1139, 1144 (2d Cir.1982); *Seagrave Corp. v. Vista Resources, Inc.*, 696 F.2d 227, 229 (2d Cir.1982).

7. *Glick v. Campagna*, 613 F.2d 31, 35 n. 3 (3d Cir.1979) (Court not persuaded Congress intended acts to apply to small close corporations, but "a literal reading of the statute and governing precedent" indicate the Acts apply).

8. *Coffin v. Polishing Machines, Inc.*, 596 F.2d 1202, 1204 (4th Cir.1979); *Occidental Life Ins. Co. v. Pat Ryan & Assocs., Inc.*, 496 F.2d 1255, 1261 (4th Cir.1974).

9. *Daily v. Morgan*, 701 F.2d 496 (5th Cir.1983).

10. *Cole v. PPG Indus.*, 680 F.2d 549, 555-56 (8th Cir.1982)(interpreting Arkansas law).

well-known in commerce and specifically listed in the statutory definition of a "security."

We have applied a "risk capital" test to determine whether in a particular transaction a note is a "security" under the Acts[11]. Under this test, a note is a "security" if it reflects "a contribution of risk capital subject to the entrepreneurial or managerial efforts of others." *Great Western Bank & Trust v. Kotz*, 532 F.2d 1252, 1257 (9th Cir.1976), *quoting El Khadem v. Equity Securities Corp.*, 494 F.2d 1224, 1229 (9th Cir.1974). The test distinguishes investment transactions, which are covered by the Act, *see United States v. Carman*, 577 F.2d 556, 563 n. 9 (9th Cir. 1978), for routine commercial transactions, which are not, *see e.g., Great Western Bank*, 532 F.2d at 1257.

The sale-of-business doctrine rests upon the premise that the Acts apply only to investment transactions, and not to commercial or entrepreneurial transactions. *See e.g., Sutter v. Groen*, 687 F.2d at 201. The doctrine derives from *Forman*, in which the Court stated:

> The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors.

421 U.S. at 849, 95 S.Ct. 2059. The court added "Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto." *Id.* The doctrine looks to the *Howey* test to determine whether in "economic reality" the transaction involves an investment. Under *Howey*, as the district court noted, the test is whether "the scheme involves an investment of money in

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11. *See Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426 (9th Cir.1978) ("promissory note" and other instruments); *United California Bank v. THC Financial Corp.*, 557 F.2d 1351 (9th Cir.1977) ("put" letter and accompanying notes); *Great W. Bank & Trust v. Kotz*, 532 F.2d 1252 (9th Cir.1976) (unsecured "demand note"); *El Khadem v. Equity Sec. Corp.*, 494 F.2d 1224 (9th Cir.1974).

a common enterprise with profits to come solely from the efforts of others." *Howey*, 328 U.S. at 301, 66 S.Ct. at 1104.

The application of the *Howey* test to the acquisition of a business through purchase of stock is straightforward: when a person purchases control of a business, he does not make an investment from which he expects profits solely from the efforts of others. Although the transaction involves stock, the economic realities reflect acquisition of a business, not passive investment, and the Acts therefore do not apply. Cases that reject the sale-of-business doctrine look only to the nature of the instruments involved: if they possess the ordinary characteristics of stock, they are "securities" and within the coverage of the Acts without regard to the nature of the underlying transaction.

In contrast, both the sale-of-business doctrine and the risk capital test follow *Forman* and reject a literal reading of the statute in favor of an inquiry into the economic realities of the underlying transaction. Both include a transaction only if it involves "an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey*, 328 U.S. at 301, 66 S.Ct. at 1104. Both exclude essentially "commercial" transactions in which there is no "investment,". Thus, risk capital cases and cases endorsing the sale-of-business doctrine interpret the Acts in precisely the same way.

We see no principled way to justify an analysis in which we determine whether a note is a "security" within the meaning of the Acts by examining the transaction in light of the statutory purpose, but determine whether stock is a "security" by examining only the instrument and not the transaction in light of the statutory purpose. We therefore conclude that adherence to the principle of construction adopted in our "note" cases requires adherence to the "sale-of-business" exclusion from the Securities Acts of the purchase of 100 per cent of the stock of a closely-held corporation.

B.

The sale-of-business doctrine is still evolving, and its contours remain in some respects uncertain. However, under any

formulation of the doctrine, the economic realities of this transaction leave no doubt that the district court reached the correct result, at least with respect to the sole appellant in this case, Landreth II.

As to Landreth II, the underlying transaction involved the sale of an entire business, effected through a sale of 100 per cent of the corporation's stock. Following the transaction, Landreth II had full control of the corporation, including the day-to-day operations of the mill and its employees. In "economic reality," the underlying transaction was a sale of a lumber business and, under the sale-of-business doctrine, was not an investment in a "security."

Appellant suggests summary judgment was inappropriate because there were disputed issues of fact with regard to Landreth's post-closing managerial role. Appellant asserts it purchased the Landreth stock only because it believed Landreth would supervise the enterprise without participation by members of the purchasing group until the mill was completed and profitable operations were underway. The uncontested facts belie this assertion. Purchasers attempted to convince Landreth to continue as manager of the mill, but he refused. Appellant employed its own manager who assumed effective control of the business. Landreth agreed to serve only as a consultant, and for no more than one year; even these services were terminable at the will of appellant. Neither Landreth nor appellant's manager can be regarded as a third-party upon whose efforts the purchaser relied for its profit within the meaning of *Howey*. *Bitter v. Hoby's International, Inc.*, 498 F.2d 183, 186 (9th Cir.1974).

III.

While this appeal was pending Landreth II moved to add as plaintiffs Dennis, and Bolten individually and as the administrator of the estate of his wife, Katharine S.A. Bolten. Although appellant brought this motion under Fed.R.Civ.P. 19 to add parties plaintiff, in substance it is a motion to intervene under Fed. R.Civ.P. 24 since the parties to be added are appellant's controlling stockholders. A court of appeals may

permit intervention where none was sought in the district court "only in an exceptional case for imperative reasons," *McKenna V. Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir.1962). Intervention is sought without stating any reason for failure to intervene in the district court beyond the fact that intervention would permit the additional parties to avail themselves of the doctrine recognized in *Sutter V. Groen*, 687 F.2d 197 (7th Cir.1982), decided after this appeal was filed. Bolten and Dennis were obviously aware of defendants' reliance on the sale-of-business doctrine in the district court. No "imperative reason" has been advanced to allow intervention at this late date. As appellees point out, intervention would raise new issues of fact and law not before the district court. *See Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1328 (9th Cir.1977). The motion is denied.

The judgment is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C78-663R

LANDRETH TIMBER COMPANY, INC.,
Plaintiff,

v.

IVAN K. LANDRETH AND LUCILLE LANDRETH, husband and wife; THOMAS E. LANDRETH, IVAN K. LANDRETH, Jr., and KATHLEEN LANDRETH, husband and wife,
Defendants.

IVAN K. LANDRETH AND LUCILLE LANDRETH, husband and wife; THOMAS E. LANDRETH, IVAN K. LANDRETH, Jr., and KATHLEEN LANDRETH, husband and wife,
Counterclaim Plaintiffs,

v.

LANDRETH TIMBER COMPANY, INC.,
Counterclaim Defendant.

ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER comes before the Court on cross-motions for summary judgment. Oral argument was heard on February 27, 1981. At the conclusion of that hearing, the Court indicated its inclination to grant summary judgment in favor of the defendants and asked counsel to submit a list of admitted facts bearing on the issue of managerial control. Subsequent to the hearing, counsel submitted admitted facts and supplemental memoranda regarding managerial control. Having considered the motions, memoranda, affidavits, admitted facts, and being fully advised, the Court now finds and rules as follows:

This is an action by the plaintiff Landreth Timber Company to recover for violation of the federal securities laws,[1] state securities laws and state common law. The issue presented is whether the sale of 100% of the stock of a closely-held corporation is a transaction covered by the federal securities laws. This Court joins a growing majority in holding that the federal securities laws do not apply.

Summary judgment is proper where there is no genuine issue of material fact or where viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law. *Great Western Bank & Trust v. Kotz*, 532 F.2d 1252, 1254 (9th Cir. 1976); *Marx v. Computer Services Corp.*, 507 F.2d 485, 487 (9th Cir. 1974). A factual issue is immaterial if resolution of the issue is not necessary in order for the court to reach its decision. *Cordas v. Specialty Restaurants*, 470 F. Supp. 780 (D. Ore. 1979).

The material facts in this case are undisputed. The defendants sold 100% of the stock of the Landreth Timber Company to the plaintiff's predecessor-in-interest. The stock possessed the ordinary characteristics of stock. The two principal financial backers behind the purchase, Samuel S. Dennis and John Bolten Sr., were not knowledgeable in any aspect of the lumber industry.

Prior to closing the transaction, the purchasers retained Phil Cook to be general manager of the mill after closing. On the closing date, November 17, 1977, two agreements were entered into: (1) a stock purchase agreement which transferred 100% of the stock and required the defendants to deliver to the purchasers the signed resignations of all the officers and directors of the Landreth Timber Company, and (2) a consulting agreement between Ivan K. Landreth Sr. and the purchasers. The nature and scope of Landreth's post-closing role as consultant was defined in the consulting agreement as follows:

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[1] Section 12 (1), 12(2), and 17(a) of the Securities Act of 1933, 15 U.S.C. §§ 771(1), 771(2) and 77q(a); section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); Rule 10b-5 of the Securities Exchange Commission, 17 CFR § 250.10b-5.

> 1.2 *Consulting Duties, Etc.* The Company shall employ the consultant (a) to participate in the operation of the timber mill owned by the Company in the first six (6) months of the Consulting Period, and (b) for such purposes as the Company reasonably deems appropriate in the second six (6) months of the Consulting Period; and the consultant shall devote such time and effort and shall perform such services as are appropriate or necessary to the performance of his duties as a consultant to the Company in connection with such participation and for such purposes.

Pursuant to this agreement, Landreth's role was purely advisory; the authority to make any and all managerial decisions was transferred to Phil Cook and, ultimately, to the purchasers. The consulting agreement also provided that Landreth's post-closing employment was terminable by plaintiff at will upon thirty days' prior written notice.

Subsequent to closing the transaction, it allegedly became apparent that numerous misrepresentations had been made by the defendants during the course of negotiations. The plaintiff terminated the consulting agreement with Landreth and filed this action.

The threshold issue in this case is whether the stock involved is a "security." The parties agree that a transaction evidence by the sale of stock is not necessarily a security transaction simply because the statutory definition of a security includes the words "any . . . stock." *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 848 (1974). Rather, the courts adhere to the principle that "in searching for the meaning and scope of the work "security" in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

What, then, are the relevant "economic realities" that must be examined? How closely should a court examine a stock before determining whether it is a "security"? It is here that the parties differ. The plaintiff contends that the Court should constrain itself to examining the characteristics of the stock itself. The plaintiff points out the Landreth stockholders have the following rights: receiving notice of any shareholders' meeting; electing and removing directors and filling vacancies;

receiving certificates representing their ownership interest; transferring shares to a third party; receiving declared dividends; amending by-laws; and all rights granted to shareholders by Washington law. The plaintiff argues that these traditional characteristics of stock would lead a reasonable purchaser to assume that the securities laws would apply and, therefore, the Court should look no further.

The defendants, on the other hand, urge the Court to look beyond the characteristics of stock to the economic realities of the underlying transaction. They contend that the transaction at issue was essentially the sale of a business, through the transfer of stock, and that such a transaction is not within the purview of the federal securities laws.

This issue can be resolved only after a careful reading of the Supreme Court's decision in *Forman, supra*. In *Forman*, residents of a cooperative housing project, who had been required to purchase "stock" in the housing cooperative in order to acquire a residential unit, filed an action for fraud under the federal securities laws. The Court held that the shares of stock did not constitute "securities" within the meaning of those laws.

In part "A" of the Forman opinion, the Court rejected the argument that a transaction, evidenced by the sale of shares called "stock," must be considered a security transaction simply because the statutory definition of a security includes the works "any . . . stock." 421 U.S. at 848. In doing so, the Court emphasized the purposes underlying the federal securities laws.

> The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statues to turn on the economic realities underlying a transaction, and not on the name appended thereto. 421 U.S. at 849.

The Court concluded that the "stock" before it was not a "security" within the meaning of the federal securities laws. In doing so, the Court relied both on the fact that the shares

did not possess the characteristics traditionally associated with stock (e.g. no dividends, no right to pledge or hypothecate, no voting right), and on the fact that the inducement to purchase was solely to acquire subsidized low-cost living space; it was not to invest for profit. 421 U.S. at 851.

In part "B" of the opinion, the Court rejected the Court of Appeals' conclusion that a share in the housing cooperative was an "investment contract" as defined by the Securities Acts, and rejected the plaintiffs' further argument that in any event what they agreed to purchase is "commonly known as a 'security'" within the meaning of those laws. The Court stated:

> In considering these claims we again must examine the substance—the economic realities of the transaction—rather than the names that may have been employed by the parties. We perceive no distinction, for present purposes, between an "investment contract" and an "instrument commonly known as a 'security'." In either case, the basic test for distinguishing the transaction from other commerical dealings is
>
> > "whether the scheme involves and investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey*, 328 U.S. at 301.
>
> This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture promised on a reasonable expectation of profits to be derived from the entrpreneurial or managerial efforts of others. 421 U.S. at 852.

Three aspects of the above-quoted passage should be noted in particular. First, the Court states that "we *again* must examine the substance—the economic realities of the transaction . . ." (emphasis added). This is a further indication that the Court in part "A" was looking to the economic realities of the underlying transaction, and not simply examining the characteristics of the stock instruments themselves. Second, the Court indicates a distinction between security transactions and "other commerical dealings." As the Court states later in the same paragraph, in a securities transaction the investor is attracted solely by the prospect of a return on his investment. 421 U.S. at 852.

> By contrast, when a purchaser is motivated by a desire to use or consume the item purchased—"to occupy the land or develop it themselves" as the *Howey* Court put it, *ibid.*—the securities laws do not apply. 421 U.S. at 852-53.

Finally, it should be noted that the Court states that the *Howey* test "embodies the essential attributes that run through *all* of the Court's decisions *defining a security*." (emphasis added). This is a strong indication that the Court intends that the *Howey* test be generally applicable to all cases where the meaning of "security" is at issue, not just cases involving the definition of "investment contract." This conclusion is further supported later in the *Forman* opinion where the Court states:

> What distinguished a security transaction—and what is absent here—is an investment where one parts with his money in the hope of receiving profits from the efforts of others. . . 421 U.S. at 858.

For these reasons, this Court concludes: (1) that it must look beyond the characteristics of the stock itself to the economic realities of the underlying transaction, (2) that it must bear in mind a distinction between security transactions and other commercial dealings, and (3) that the *Howey* test focuses on the relevant "economic realities" and is applicable in determining whether a stock transaction is within the purview of the federal securities laws. These conclusions comport with the majority of post-*Forman* decisions. *Frederiksen v. Poloway*, 637 F.2d 1147 (7th Cir. 1981); *Chandler v. Kew*, Fed Sec. L. Rptr. ¶ 96,966 (10th Cir. 1977); *Bula v. Mansfield*, Fed. Sec. L. Rptr. ¶ 96,964 (D. Col. 1977); *Dueker v. Turner*, Fed. Sec. L. Rptr. ¶ 97,535 (D. Geo. 1979); *Anchor-Darling Industries v. Leonard Suozzo*, No. 79-4085, E.D. Penn, March 16, 1981; *Barsy v. Verin*, No. 79 C 3323, N.D. Ill., February 25, 1981. *But see Coffin v. Polishing Machines, Inc.*, 596 F.2d 1202 (4th Cir. 1979); *Titsch Printing, Inc. v. Hastings*, 456 F. Supp. 445 (D. Col. 1978); *Bronstein v. Bronstein*, 407 F. Supp. 925 (E.D. Penn 1976).

In applying the *Howey* test, this Court need only determine whether the third requirement has been met, whether the purchasers were led to expect profits from the managerial or entrepreneurial efforts of others. This determination must be

made based on the factual circumstances at the time of the agreement and not on facts occurring subsequent to the agreement. *El Khadem v. Equity Securities Corp.*, 494 F.2d 1224, 1228 (9th Cir. 1974). It also irrelevant for the purchasers to argue that they relied on Landreth's past efforts to build up the business. As the Seventh Circuit stated in *Emisco Industries v. Pro's Inc.*, 543 F.2d 38 (7th Cir. 1976):

> This only repeats plaintiffs' allegation of reliance upon misrepresentations made during the purchase. The important element for the transaction to constitute an investment is that [the purchaser] relied on the present and future efforts of another to produce profits. 543 F.2d at 41.

Thus, events occurring prior to the agreement are relevant only insofar as they indicate whether the purchasers, as of the date of the agreement, were led to expect profits resulting from the future entrepreneurial or managerial efforts of others.

The purchasers argue that the third requirement of *Howey* has been met because they were led to expect profits from the efforts of Landreth and Cook. In other words, the purchasers argue that Landreth and Cook are "others" for purposes of the third requirement of the *Howey* test.

This argument exalts a literal reading of the *Howey* test over the purposes of the federal securities laws. The fundamental purpose of those laws is to protect those who place their money in the hands of someone over whom they exercise little or no control. Persons or entities who are beyond the control of the purchaser are "others" within the meaning of *Howey* and *Forman*. Employees, including managers and consultants, are not. *Bitter v. Hoby's International Inc.*, 498 F.2d 183 (9th Cir. 1974). In the words of the Ninth Circuit in *Bitter*:

> For the manager to be a "third party," within the meaning of the *Howey* test, the manager must be outside of the direct and immediate control of the franchise. 498 F.2d at 186.

In the present case, both Landreth and Cook, as employees, were under the direct and immediate control of the purchasers after the sale and, therefore, they are not "others' or "third parties" within the meaning of *Howey* and *Forman*. Because

there are no "others" involved in this case, it is not necessary to apply the analysis in *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973).[2]

For these reasons, the motion for reconsideration is DENIED and the defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

The Clerk of this Court is directed to send uncertified copies of this Order to all counsel of record.

DATED at Seattle, Washington, this 29th day of April, 1981.

/s/ Barbara J. Rothstein
United States District Judge

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[2] In *Turner*, the promoter/seller was beyond the control of the purchasers and, therefore, it was an "other" or "third party" within the meaning of *Howey*. This made it necessary to analyze whether the undeniably significant efforts were those of the purchasers or those of the promoter. But, in the present case, Landreth and Cook are not "others" because they were within the control of the purchasers and, therefore, there is no occasion to analyze whether the undeniably significant decisions were made by Landreth, Cook, or the purchasers.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

LANDRETH TIMBER COMPANY, INC. Plaintiff, vs. IVAN K. LANDRETH and LUCILLE LANDRETH, et at., Defendants.	CIVIL ACTION NO. C78-663R DEFENDANT'S REQUESTS TO PLAINTIFFS FOR ADMISSIONS OF FACT CONCERNING POST-CLOSING CORPORATE CONTROL
IVAN K. LANDRETH and LUCILLE LANDRETH, husband and wife, et al., Counterclaim Plaintiffs, vs. LANDRETH TIMBER COMPANY, INC., Counterclaim Defendants.	DOCKETED

TO: Landreth Timber Company, Inc., and its attorney, John W. Hathaway, EDWARDS & BARBIERI

Pursuant to Court order and Rule 36 of the Federal Rules of Civil Procedure, you are hereby requested to admit to or specifically deny the truth of the matters set forth below on or before March 25, 1981. You are reminded that FRCP 36 requires that "[a] denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder.

Definitions

1. The term "plaintiff" refers to plaintiff/counterclaim defendant Landreth Timber Company, Inc.

2. The term "defendants" refers to defendants/counterclaim plaintiffs Ivan K. Landreth and Lucille Landreth, husband and

wife; Thomas E. Landreth; and Ivan K. Landreth, Jr. and Kathleen Landreth. Unless otherwise indicated, the name "Landreth" or "Ivan Landreth" refers to Ivan K. Landreth.

3. The term "Dennis" refers to Samuel S. Dennis III of Newton, Massachusetts, buyer under the Stock Purchase Agreement dated October 6, 1977.

4. The term "closing" refers to November 17, 1977, the date on which the sale of Landreth Timber Company, Inc. by defendants to B & D Company, Inc., plaintiff's predecessor in interest, was consummated.

REQUESTS FOR ADMISSIONS

1. Attached hereto are true, correct, and authentic copies of the following documents:

a) Executed Stock Purchase Agreement dated October 6, 1977.

b) Executed Assignment Of, And Amendment To, Stock Purchase Agreement dated November 16, 1977.

c) Executed Articles of Merger of Landreth Timber Company, Inc. into B & D Company, Inc. dated November 17, 1977.

(d) Executed Agreement And Plan or Merger of Landreth Timber Company, Inc. into B & D Company, Inc. dated November 17, 1977.

(e) Executed Resignation of Officers of Landreth Timber Company, Inc. dated November 17, 1977.

(f) Executed Resignation of Directors of Landreth Timber Company, Inc. dated November 17, 1977.

(g) Document numbers 11001969 through 11002041, consisting of stock certificates and related assignments having as their cumulative effect the vesting of ownership of Landreth Timber Company, Inc. stock after November 17, 1977, in Dennis, Lillian W. Dennis, John Bolten, Sr., John Bolten, Jr., Katherine S. Bolten, Jack P. Branch, Robert E. Branch, Al Willard, Isabel Willard, Troy Beaver, Sr., and Troy Beaver, Jr.

(h) Action of Sole Director (Dennis) dated November, 1977 (Document numbers 11002296-97).

(i) Letter from Jack P. Branch to Dennis dated October 20, 1977 with resume attachments (Document numbers 11003155-61; Deposition Exhibit 31).

(j) Letter from Jack Branch to Ivan Landreth dated October 27, 1977 (Document number 41000053-54; Deposition Exhibit 115).

(k) Letter from Jack Branch to Phil Cook dated December 19, 1977 (Document number 11003314; Deposition exhibit 294).

(l) Certificates of President signed by Dennis and dated November 17, 1977 (Document number 11002330).

(m) Letter from Dennis to Supervisor, Colville National Forest, dated November 17, 1977 (Document number 11002331).

(n) Letter from Jack Strother to Ivan Landreth dated March 3, 1978 (Document number 61000067).

(o) Letter from Ivan Landreth to Jack Strother dated January 16, 1978 (Document numbers 61000219-21).

(p) Executed Consulting and noncompetition Agreement effective November 17 (Document numbers 11002177-180).

(q) Letter from Jack Branch to Ivan Landreth dated January 10, 1978 (Document Exhibit 298).

(r) Letter from Jack Branch to Dennis and John Bolten dated November 21, 1977 (Document numbers 11003242-43; Deposition Exhibit 285).

(s) Letter from Jack Branch to Dennis and John Bolten dated November 28, 1977 (Document numbers 11003244-45; Deposition Exhibit 286).

(t) Letter from Jack Strother to Phil Cook dated December 1, 1977 (Document number 11004196).

(u) Letter from Dennis to Jack Branch dated December 1, 1977 (Document number 11003257; Deposition Exhibit 287).

(v) Letter from Jack Branch to Dennis and John Bolten dated December 6, 1977 (Document numbers 11003269-71; Deposition Exhibit 288).

(w) Letter from Dennis to Phil Cook dated December 7, 1977 (Documant number 11003277; Deposition Exhibit 290).

(x) Letter from Dennis to Phil Cook dated December 7, 1977 (Document numbers 1003274-76; Deposition Exhibit 291).

(y) Letter from Jack Branch to Dennis dated December 12, 1977 (Document numbers 11003282-85; Deposition Exhibit 292).

(z) Letter from Dennis to Phil Cook dated December 13, 1977 (Document number 11003287).

(aa) Letter from Dennis to John Bolten dated December 16, 1977 (Document numbers 11003302-05; Deposition Exhibit 296).

RESPONSE:
Admit.

2. As of October 5, 1977, one hundred percent (100%) of the outstanding stock of Landreth Timber Company, Inc. was owned by defendants Ivan K. Landreth, Ivan K. Landreth, Jr., and Thomas E. Landreth.

RESPONSE:
Admit.

3. As of October 5, 1977, the most valuable physical asset of Landreth Timber Company, Inc., was a lumber manufacturing facility under reconstruction in Tonasket, Washington.

RESPONSE:
Admit.

4. Under the terms of a Stock Purchase Agreement dated October 6, 1977, Ivan K., Landreth, Ivan K. Landreth, Jr., and Thomas E. Landreth, as sellers, agreed to sell one hundred percent (100%) of the outstanding stock in Landreth Timber Company, Inc. to Samuel S. Dennis III (''Dennis'') as buyer.

RESPONSE: Deny insofar as request assumes parties contemplated that Dennis executed stock purchase agreement in individual capacity. Admit that, under the terms of the stock purchase agreement, defendants agreed to sell 100% of the outstanding (continued on attached sheet)

5. Closing of the Stock Purchase Agreement occurred on November 17, 1977.

RESPONSE:
Admit.

6. Under the terms of an Assignment of, And Amendment To, Stock Purchase Agreement dated November 16, 1977, Dennis assigned his interest in Landreth Timber Company, Inc. to B & D Company, Inc.

RESPONSE:
(see answer on attached sheet)

7. B & D Company, Inc. is a Delaware corporation which was formed pursuant to the direction of Dennis, or his business partners or agents.

RESPONSE:
(see answer on attached sheet)

8. Under the terms of an Agreement and Plan of Merger dated November 17, 1977, Landreth Timber Company, Inc. was merged into B & D Company, Inc.

RESPONSE:
Admit.

9. The merger of Landreth Timber Company, Inc. into B & D Company, Inc. was effected pursuant to the direction of Dennis, or his business partners or agents.

RESPONSE:
(see answer on attached sheet)

10. Upon consummation of the merger of Landreth thereafter continued to conduct the sawmill business as Landreth Timber Company, Inc.

RESPONSE:
Admit.

11. None of the defendants were officers, directors, shareholders, or employees of B & D Company, Inc.; nor did said defendants have any financial interest of any kind in B & D Company, Inc.

RESPONSE:
Admit.

12. Prior to closing, the officers of Landreth Timber Company, Inc. consisted of Ivan K. Landreth as President, and Lucille Landreth as Vice-President and Secretary-Treasurer.

RESPONSE:
Admit.

13. Prior to closing, the entire Board of Directors of Landreth Timber Company, Inc. consisted of Ivan K. Landreth, Lucille Landreth, and Thomas E. Landreth.

RESPONSE:
Admit.

14. Paragraph 4(b)(3) of the Stock Purchase Agreement required the sellers of Landreth Timber Company to deliver to buyer at closing the signed resignations of all officers and directors of the company.

RESPONSE:
Admit.

15. At closing on November 17, 1977, Ivan K. Landreth executed a written resignation as president of Landreth Timber Company, and Lucille Landreth executed a written resignation as vice-president and treasurer of the company.

RESPONSE:
Admit.

16. At closing On November 17, 1977, Ivan K. Landreth Lucille Landreth, and Thomas E. Landreth resigned as directors of Landreth Timber Company.

RESPONSE:
Admit.

17. Prior to November 17, 1977, Dennis assembled a group of individuals to hold stock in Landreth Timber Company after closing of the sale; none of the defendants were included in this group.

RESPONSE: Deny that Dennis assembled the purchasing group. Admit that defendants purchased no shares in B & D Company, Inc. or in the successor Landreth Timber Co., Inc.

18. After closing on November 17, 1977, two classes of Landreth Timber Company stock existed. Class A stock was owned by Dennis, Lillian W. Dennis, John Bolten, Sr., John Bolten, Jr., and Katherine S. Bolten. Class B stock was owned by Jack P. Branch, Robert E. Branch, Al Willard, Isabel Willard, Troy Beaver, Sr., and Troy Beaver, Jr.

RESPONSE:
Admit.

19. After closing, none of the defendants were officers, directors, or shareholders in Landreth Timber Company.

RESPONSE:
Admit.

20. After closing, none of the defendants retained any ownership interest in Landreth Timber Company.

RESPONSE: Admit that defendants had no stock ownership interest in Landreth Timber Company after closing.

21. After closing, none of the defendants had any right to share in profits or losses of Landreth Timber Company.

RESPONSE:
(see answer on attached sheet)

22. After closing, none of the defendants, other than Ivan Landreth, had any employment relationship with Landreth Timber Company or were involved in any respect with the operation of the company.

RESPONSE:
Admit.

23. Immediately after closing, the board of directors of Landreth Timber Company consisted of Dennis and John Bolten, Sr.

RESPONSE:
Admit.

24. Immediately after closing, the officers of Landreth Timber Company consisted of John Bolten, Sr., chairman of the board; Dennis, president and treasurer; Jack G. Strother, secretary; and Ruth A. Weymouth, assistant secretary.

RESPONSE:
Admit.

25. Prior to closing, Jack Branch began searching for a General Manager to replace Ivan Landreth after closing.

RESPONSE: Admit that Jack Branch began searching for a general manager prior to closing. Deny that the general manager was to replace Ivan Landreth.

26. Jack Branch was acting on behalf of Dennis in attempting to locate a General Manager.

RESPONSE: Deny that Jack Branch was acting on behalf of Dennis in attempting to locate a general manager. Admit that Jack Branch acted on behalf of purchasers.

27. By letter dated October 20, 1977, Jack Branch advised Dennis that his search for a new General Manager had narrowed to three candidates, one of which was Phil Cook.

RESPONSE:

Admit.

28. Between October 20, 1977 and closing on November 17, 1977, Dennis' purchasing group selected and retained Phil Cook to be General Manager of Landreth Timber Company after closing.

RESPONSE:

Admit.

29. Prior to closing, Landreth provided the purchasers with the name of an individual he recommended as a possible general manager. This individual was not Phil Cook.

RESPONSE:

(see answer on attached sheet)

30. Ivan Landreth did not in fact participate in the decision to hire Phil Cook as General Manager.

RESPONSE:

(see answer on attached sheet)

31. By letter dated October 27, 1977, Jack Branch informed Ivan Landreth that Phil Cook had been hired to be the new General Manager after closing, and requested that Landreth extend "all courtesies to Phil in any interim meetings that you will have with him prior to our formal take over" after closing.

RESPONSE:

Admit.

32. After closing, Phil Cook immediately assumed the position of General Manager of Landreth Timber Company operations.

RESPONSE:

Admit.

33. Ivan Landreth's role with Landreth Timber Company after closing was as a consultant pursuant to the terms of a

Consulting and Non-Competition Agreement dated November 17, 1977.

RESPONSE:

Admit.

34. Ivan Landreth had no job title with Landreth Timber Company after closing.

RESPONSE:

Deny.

35. The nature and scope of Ivan Landreth's post-closing role as consultant were defined by paragraph 1.2 of the Consulting Agreement, to wit:

> 1.2. *Consulting Duties, etc.* The Company shall employ the Consultant (a) to participate in the operation of the timber mill owned by the Company in the first six (6) months of the Consulting Period, and (b) for such purposes as the company reasonably deems appropriate in the second six (6) months of the Consulting Period; and the Consultant shall devote such time and effort and shall perform such services as are appropriate or necessary to the performance of his duties as consultant to the Company in connection with such participation and for such purposes.

RESPONSE:

Admit.

36. Ivan Landreth's compensation as a consultant was on a fixed monthly salary plus expenses with no profit sharing, commissions, or other components.

RESPONSE:

Admit.

37. Paragraph 2.2 of the Consulting Agreement defined the circumstances under which Landreth Timber Company would reimburse Ivan Landreth for expenses incurred by him in his role as a consultant, to wit:

> 2.2 *Reimbursement of Costs and Expenses.* Consultant will be reimbursed for his reasonable costs and expenses in connection with the performance of services specifically requested by the Company upon reasonable substantiation and approval by the Company of such costs and expenses.

RESPONSE:

Admit.

38. Paragraph 8(c) of the Consulting Agreement provided that Ivan Landreth's post-closing employment was terminable by plaintiff at will upon thirty days prior written notice.

RESPONSE:

Admit.

39. After closing, Jack Branch monitored construction progress and operations at the mill, and reported periodically to Dennis and Bolten concerning the same.

RESPONSE:

(see answer on attached sheet)

40. By letter dated November 21, 1977, Jack Branch reported to Dennis and Bolten concerning certain events related to "the transition" during the first several days after closing, stating among other things:

> "[I]t was very gratifying to see a take-charge guy like Phil Cook showing his real leadership capabilities and literally snapping them [the employees] to and starting to run the show like a real business. I do feel you can be proud of Phil Cook and his business-like manner and overall leadership."

RESPONSE:

(see answer on attached sheet)

41. Two days after closing, Phil Cook excluded Ivan Landreth from a meeting with representatives of Warren & Brewser, the maxi-mill supplier.

RESPONSE:

Deny.

42. After closing, Landreth Timber Comopany and Phil Cook possessed the authority to hire or fire employees without the permission or concurrence of Ivan Landreth.

RESPONSE:

Admit.

43. After closing, Ivan Landreth did not possess the authority to hire or fire employees without the permission or concurrence of Landreth Timber Company or Phil Cook.

RESPONSE:

Admit.

44. After closing, Ivan Landreth did not in fact hire or fire any Landreth Timber Company employees.

RESPONSE:

Admit.

45. After closing, Landreth Timber Company possessed the authority to set or change employee salary levels without the permission or concurrence of Ivan Landreth.

RESPONSE:

Admit.

46. After closing, Ivan Landreth did not possess the authority to set or change employee salary levels without the permission or concurrence of Landreth Timber Company or Phil Cook.

RESPONSE:

Admit.

47. After closing, Ivan Landreth did not in fact set or change any salary levels for Landreth Timber Company employees.

RESPONSE:

Admit.

48. After closing, Phil Cook possessed the authority to enter into new timber purchase contracts without the permission or concurrence of Ivan Landreth.

RESPONSE:

Admit.

49. After closing, Ivan Landreth did not possess the authority to enter into new timber purchase contracts without the permission or concurrence of Landreth Timber Company or Phil Cook.

RESPONSE:

Admit.

50. After closing, Ivan Landreth did not in fact enter into any new timber purchase contracts on behalf of Landreth Timber Company.

RESPONSE: Admit that defendant Landreth signed no such contracts. Deny that defendant Landreth did not participate in bidding on, and acquiring, such contracts on behalf of plaintiff.

51. Prior to closing, Landreth Timber Company purchased timber from the United States Forest Service.

RESPONSE:
Admit.

52. Paragraph 2(j) of the Stock Purchase Agreement stated that Landreth Timber Company had in the past purchased "most" of its timber requirements from the Forest Service.

RESPONSE:
Admit.

53. By letter dated November 17, 1977, Dennis informed the Forest Service that Landreth Timber Company had been sold to a new purchasing group, that Dennis was the controlling stockholder and that Phil Cook was "the new General Manager of all operations at Landreth Timber Company."

RESPONSE:
Admit.

54. By an instrument entitled "Certificate of President" dated November 17, 1977, Dennis attested that the following resolution was adopted by all of the new directors of Landreth Timber Company:

> *RESOLVED:* That Phillip A. Cook, as General Manager of the Company's operations, is hereby designated and authorized as the Company's representative to deal with the United States Forest Service and to execute all documents in connection with timber cutting contracts and any and all matters between Forest Service and the Company.

RESPONSE:
Admit.

55. After closing, Landreth Timber Company and Phil Cook possessed the authority to make decisions for Landreth Timber Company concerning product mix, product sales, and sale terms without the permission or concurrence of Ivan Landreth.

RESPONSE:
(see answer on attached sheet)

56. After closing, Ivan Landreth did not possess the authority to make decisions for Landreth Timber Company concerning product mix, product sale prices, or sale terms without the permission or concurrence of Landreth Timber Company or Phil Cook.

RESPONSE:
Admit.

57. After closing, Ivan Landreth, did not in fact make or implement any decisions for Landreth Timber Company concerning product mix, product sale price, or sale terms on behalf of Landreth Timber Company.

RESPONSE:
Admit.

58. After closing, Landreth Timber Company and Phil Cook possessed the authority to make decisions concerning expenditures for equipment acquisitions and maintenance without the permission or concurrence of Ivan Landreth.

RESPONSE: Deny that Cook was not required to confer with defendant Landreth concerning expenditures for equipment acquisitions and maintenance. Admit that, after conferring with defendant Landreth, Cook was authorized to make these decisions on behalf of plaintiff.

59. After closing, Ivan Landreth did not possess the authority to make decisions for Landreth Timber Company concerning expenditures for equipment acquisitions and maintenance without the permission or authority of Landreth Timber Company or Phil Cook.

RESPONSE:
Admit.

60. After closing, Ivan Landreth did not in fact make or implement any decisions for Landreth Timber Company concerning expenditures for equipment acquisitions or maintenance.

RESPONSE:
Deny.

61. After closing, Landreth Timber Company and Phil Cook possessed the authority to make decisions concerning construction, design, or redesign of the sawmill without the permission or concurrence of Ivan Landreth.

RESPONSE: Deny that Cook was not required to confer with defendant Landreth concerning construction and design of the

facility. Admit that, after conferring with defendant Landreth, Cook was authorized to make these decisions on behalf of the plaintiff.

62. After closing, Ivan Landreth did not possess the authority to make decisions for Landreth Timber Company concerning construction, design, or redesign of the sawmill without the permission or concurrence of Landreth Timber Company or Phil Cook.

RESPONSE:

Admit.

63. After closing, Ivan Landreth did not in fact make or implement any decision for Landreth Timber Company concerning construction, design, or redesign of the sawmill.

RESPONSE:

Deny.

64. By letter dated December 7, 1977 (Deposition Exhibit 290) Dennis communicated with Phil Cook concerning product mix policy and the potential advisability of purchasing a new kiln.

RESPONSE:

Admit.

65. Dennis sent copies of the letter which is Deposition Exhibit 290 to John Bolten, Jack Branch, Peter Townsend, Thomas Wood, and Frederick Fritz, but not to Ivan Landreth.

RESPONSE:

Admit.

66. By a second letter dated December 7, 1977 (Deposition Exhibit 291) Dennis communicated with Phil Cook concerning product pricing policy.

RESPONSE:

Admit.

67. Dennis sent copies of the letter which is Deposition Exhibit 291 to John Bolten, Jack Branch, Peter Townsend, Thomas Wood, and Frederick Fritz, but not to Ivan Landreth.

RESPONSE:

Admit.

68. By letter dated December 19, 1977 (Deposition Exhibit 294), Jack Branch advised Phil Cook of Ivan Landreth's post-closing role at the mill, stating, among other things:

> "Ivan Landreth and his sons have sold 100% of the stock of Landreth Timber Company to B & D Corporation which subsequently will change it name back to Landreth Timber Company. Ivan Landreth has no stock whatsoever in the company and has been retained on an interim basis for perhaps one to three months as a consultant on matters relating to the transition in sales, contracts, customers, etc. In the event any of your personnel have any vague notions or concerns as to whether Ivan is still involved in the company, please be sure that he is not and although he is still around the mill, more or less tidying upon his affairs, we will have no further use for his services in a short period of time . . . Should you have the need to show this letter to any interested party, please feel free to do so."

RESPONSE:

(see answer on attached sheet)

69. Jack Branch sent copies of the letter which is Deposition Exhibit 294 to Sam Dennis and John Bolten.

RESPONSE:

Admit.

70. Neither Sam Dennis nor John Bolten ever advised Ivan Landreth, Jack Branch, or Phil Cook that the characterization in Deposition Exhibit 294 of Ivan Landreth's role was inaccurate in any respect.

RESPONSE:

Deny.

71. Subsequent to closing, Ivan Landreth received no instructions from Dennis concerning Ivan Landreth's role as a consultant.

RESPONSE:

Deny.

72. After closing, Ivan Landreth was not allowed to sign checks in behalf of Landreth Timber Company.

RESPONSE:

Admit.

73. After closing, Ivan Landreth was not allowed the use of Landreth Timber company credit cards.

RESPONSE: Admit that defendant Landreth was not allowed the personal use of Landreth Timber Company credit cards. Admit that pursuant to consulting agreement, defendant Landreth was entitled to reimbursement for expenses.

RESPONSE:
Admit.

74. After closing, Ivan Landreth's preclosing plans for construction of a timber kickout next to the Helle mill were not completed.

RESPONSE: Admit that plaintiff did not complete construction of a timber kickout next to the Helle mill, but deny that plaintiff did not intend to complete construction of the timber kickout.

75. After closing, Ivan Landreth's plans to build up slide guides on the mill's Nicholson 43-inch debarker were not completed.

RESPONSE: Admit that the Nicholson 43-inch debarker was completely replaced and building up slide guides on it was therefore not necessary.

76. After closing, Ivan Landreth's plan to install an automatic centering device on the 43-inch debarker was not completed.

RESPONSE: Admit that the Nicholson 43-inch debarker was completely replaced and installing a centering device was therefore unnecessary.

77. After closing, Ivan Landreth's plan to install a swing-cutoff saw on line in front of the 43-inch Nicholson debarker was not completed.

RESPONSE: Admit that the Nicholson 43-inch debarker was completely replaced and that installing a swing-cutoff saw on line in front of it was therefore unnecessary.

78. After closing, Ivan Landreth's plan to install a larger hydraulic tank on the Nicholson 43-inch debarker was not completed.

RESPONSE: Admit that the Nicholson 43-ich debarker was completely replaced and that installing a larger hydraulic tank on it was therefore unnecessary.

79. After closing, Ivan Landreth's plan to replace U-shaped Helle-mill wheels and rails with V-shaped wheels and rails was not completed.

RESPONSE: Admit that replacement of the U-shaped Helle mill wheels and rails was not completed, but deny that plaintiff did not intend to replace them with V-shaped wheels and rails.

80. After closing, Ivan Landreth's plan to install a conveyor to return boards from the resaw to the edger was not completed.

RESPONSE: Admit that the conveyor return from the resaw to the edger was not completed, but deny that plaintiff did not intend to complete it.

81. After closing, plaintiff and/or Phil Cook decided to remove the Filer & Stowell edger which was on site at the time of closing.

RESPONSE:
Admit.

82. Ivan Landreth was not asked by plaintiff or Phil Cook to approve or disapprove of the decision to remove the Filer & Stowell edger.

RESPONSE:
Deny.

83. After closing, plaintiff and/or Phil Cook decided to replace the Filer & Stowell edger with a used Klamath Ward Mark 50 edger.

RESPONSE:
Admit.

84. Ivan Landreth was not asked by plaintiff or Phil Cook to approve or disapprove of the decision to purchase the Klamath Ward Mark 50 edger.

RESPONSE:
Deny.

85. On December 28, 1977, Phil Cook purchased a 26 inch debarker for installation at the mill.

RESPONSE:
Admit.

86. Ivan Landreth was not asked by plaintiff or Phil Cook to approve or disapprove of the decision to purchase the second debarker.
RESPONSE:
Deny.

87. Ivan Landreth was entirely absent from the mill from December 22, 1977 to January 10, 1978.
RESPONSE: Plaintiff does not know the exact dates that defendant Landreth was absent from the facility. Plaintiff admits that defendant Landreth was absent from the facility for approximately fifteen to twenty days in late December 1977 and early January 1978.

88. After closing, Ivan Landreth did not retain control over the essential managerial efforts and decisions upon which the failure or success of Landreth Timber Company rested.
RESPONSE:
Deny.

89. After closing, control over the essential managerial efforts and decisions affecting the failure or susccess of the Landreth Timber Company rested with the new officers, directors, shareholders, and General Manager of the company.
RESPONSE:
Deny.

90. By letter dated January 10, 1978 Jack Branch notified Ivan Landreth that his employment as a consultant was being terminated.
RESPONSE:
Admit.

91. After termination, Ivan Landreth received no compensation of any kind, other than wages up to the date of termination and 30 days severance pay, from Landreth Timber Company.
RESPONSE:
Admit.

92. Subsequent to January 10, 1978, Ivan Landreth did not participate in any way in the management or operation of Landreth Timber Company.
RESPONSE:
Deny.

93. Between November 17, 1977, and January 10, 1978, Ivan Landreth had no communications with Dennis in any way relating to the management, operation or control of Landreth Timber Company.
RESPONSE:
Deny.

94. Between November 17, 1977 and January 10, 1978, Ivan Landreth had no communications with Jack P. Branch in any way relating to the management, operation or control of Landreth Timber Company.
RESPONSE:
Deny.

95. Between November 17, 1977, and January 10, 1978, Ivan Landreth had not communications with any officer or director of Landreth Timber Company
RESPONSE:
Deny.

Dated this 20th day of March, 1981.

BOGLE & GATES
/s/ James S. Smith, Jr.
James A. Smith, Jr.
Guy P. Michelson
Patricia H. Char
Richard D. Vogt
Attorneys for Defendants

Responses to the foregoing Requests for Admissions of Fact submitted this 26th day of March, 1981.

EDWARDS & BARBIERI
/s/ Malcolm Edwards

Malcolm Edwards
John W. Hathaway
Attorneys for Plaintiff

CONTINUATION OF ANSWERS TO REQUESTS FOR ADMISSIONS

4. stock in Landreth Timber Comany to a corporation to be formed by purchasers and that Dennis executed the stock purchase agreement as an accommodation buyer on behalf of the corporation to be formed.
6. Admit that B & D Company was substituted for Dennis as buyer under the stock purchase agreement as stated in paragraph 2 of the Assignment of, and Amendment to, stock purchase agreement and as contemplated by paragraph 3 of the stock purchase agreement.
7. Deny that Dennis was solely responsible for formation of B & D Company. Admit that B & D Company was a corporation formed by the purchasing group, solely for federal tax reasons, to purchase defendant's stock.
9. Deny that the merger of Landreth Timber Company into B & D Company was effected solely at Dennis' direction. Admit that the merger of Landreth Timber Company, Inc. and B & D Company was effected for the benefit of all shareholders of B & D Company in order to establish purchaser's property tax basis in assets of Landreth Timber Company.
21. Admit that, after closing, defendants had no stock right that would have entitled them to dividends or any share in the profits or losses of the corporation. Deny that defendants had no interest in, or obligations concerning, the profits and losses of the Landreth Timber Company.
29. Admit that defendant Landreth provided Jack Branch with the name of a person to be considered for the general manager position. Admit that this person was not Phil Cook. Deny that defendant Landreth recommended that purchasers hire this person.
30. Admit that purchasers, not Ivan Landreth, decided to retain Phil Cook as general manager and that Ivan Landreth was

not part of this decision. Deny that defendant Landreth was not asked to participate and cooperate in the search for a general manager and deny that defendant Landreth did not participate in this search.

39. Deny that Branch had any duty or function as a corporate officer to oversee construction progress and operations at the mill. Admit that Branch did visit the mill periodically after closing and that he did communicate his observations to Dennis and Bolten.
40. Deny that Branch had any offical corporate oversight function. Admit that Branch's November 21, 1977 letter contained the quote stated. From information known or readily available to plaintiff, plaintiff cannot admit or deny the veracity of the quote.
55. Deny that Cook was not required to confer with defendant Landreth concerning decisions on product mix, product sales, and sale terms. Admit that, after conferring with defendant Landreth, Cook was aurhorized to make these decisions on behalf of plaintiff.
68. Admit that Branch made these statements in the December 19, 1977 letter to Phil Cook. Deny that these statements constituted advice to Cook concerning defendant Landreth's post-closing role at the mill and deny that these statements accurately describe defendant Landreth's post-closing role at the mill.

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